

J. Peter KLEIN et al.  
Appl. No. 09/544,984  
September 10, 2004

Atty. Docket No.: 4377-38

### REMARKS/ARGUMENTS

Upon entry of the above amendments, claims 10, 11, 18 and 47-49 are pending. Claims 12-15 have been cancelled. It is submitted that no new matter has been introduced by the present amendments and entry of the same is respectfully requested. By the above amendments, Applicants respectfully do not acquiesce to the propriety of any of the Examiner's rejections and do not disclaim any subject matter to which Applicants are entitled. *Cf Warner Jenkinson Co. v. Hilton-Davis Chem. Co.*, 41 U.S.P.Q.2d 1865 (U.S. 1997). Further, Applicants reserve the right to prosecute the subject matter of any canceled claim in one or more continuation, continuation-in-part, or divisional applications.

Entry of the above amendment(s) is proper under 37 C.F.R. § 1.116 because the amendments: (a) **places the application in condition for allowance** (for the reasons discussed herein); (b) **do not raise any new issues requiring further search and/or consideration** (since the amendments amplify or render moot issues previously discussed throughout the prosecution); (c) **do not present any additional claims** without canceling a corresponding number of finally rejected claims; and (d) **place the application in better form for appeal**, should an appeal be necessary. Thus, entry is respectfully requested.

The Office Action provisionally rejects claims 18 and 47-49 under 35 U.S.C. § 101 as claiming the same invention as that of claims 1, 8 and 21 of copending Application No. 09/288,556 (now U.S. Patent No. 6,774,130, which issued 10-Aug-2004). The Office Action also rejects claims 10, 11, 18 and 47-49 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 and 3 of U.S. Patent No. 6,103,730. The Office Action further rejects Claims 10-11 and 18 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over Claim 1 of U.S. Patent No.

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5,807,861 (Klein et al.). In response to these rejections, Applicants have concurrently filed herewith an appropriate Terminal Disclaimer of the above-identified patents. Applicants respectfully submit that the rejections are overcome and should be withdrawn

### **CONCLUSION**


It is believed that this application is now in condition for allowance. If anything further could be done to place the above-captioned patent application in better condition for allowance (i.e., via Examiner's Amendment), then please contact the undersigned attorney at the telephone number listed below.

Please grant any further extension(s) of time deemed necessary for entry of this communication. **To the extent necessary to maintain pendency of this application, Applicants request that a Notice of Appeal of the pending Final Office Action be entered.** The Commissioner is hereby authorized to charge any deficiency in the fee(s) filed, or asserted to be filed, or which should have been filed herewith (or with any paper filed hereafter, including the above-reference provisional Notice of Appeal) to Deposit Account No. 14-1140. Please credit any overpayment of fees to such Deposit Account.

Respectfully submitted,

**NIXON & VANDERHYE P.C.**

Date: September 10, 2004

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